ARGUMENT

BY

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DELIVERED ON THE SEVENTH NOVEMBER, 1842, BEFORE THE BOARD OF COMMISSIONERS, UNDER THE CHEROKEE TREATY OF 1835–'36

IN THE CASE OF

J. K. ROGERS, A CHEROKEE,

AGAINST

THE UNITED STATES,

FOR

SPOLIATIONS COMMITTED BY THE STATE OF GEORGIA IN DISPOSSESSING HIM OF A GOLD-MINE.

WASHINGTON
BLAIR AND RIVES PRINTERS
1843.

PREFACE.

In the publication of this Argument, the claimants under the treaty discharge a duty to themselves; gratify the expressed wish of intelligent citizens; and, are persuaded, perform an acceptable service to the public.

The subjects discussed are of deep interest to the parties—the Indians on one side, and the people of the United States, acting through the Government, on the other: every citizen, therefore, should desire to be informed and understand, in order to the award of justice. But it is a misfortune to the complainants that the sources of information are accessible to few. This argument is given to the public, to correct measurably that evil. Indian rights are here examined upon principles incontrovertible, because recognised as universal law by the great jurists of England and America. The statutory enactments and the judicial decisions of the United States, applicable to the subject, are given with perspicuity and in fullness of detail.

A confidence is felt that the reader of this argument will rise from its perusal with increased knowledge, more just sentiments, and with a conviction of its ability. Competent judges pronounce it an evidence of much research, of a mind clear in method and logical in conclusions; entitling the author to a meed of praise, and a claim for distinction, in this department of legal knowledge, among the first lawyers of the country.

WASHINGTON, Nov. 26, 1843.

ARGUMENT.

In the case of Johnson K. Rogers, a Cherokee, who has submitted a claim against the United States for damages, arising out of *spoliations* committed upon his property by the State and citizens of Georgia, in forcibly ejecting him from possession of a *gold mine* in the year 1830, and preventing him from retaking possession of the same, by virtue of a bill of injunction, I beg leave to offer the following remarks for the consideration of this honorable board:

This claim is presented under the 10th article of the treaty of 1835; the latter clause of which reads as follows: "The sum of three hundred thousand dollars is hereby set apart to pay and liquidate the just claims of the Cherokees upon the United States for *spoliations* of every kind that have not been already satisfied under former treaties."

Spoliation and *depredation* are synonymous in their meaning. They are defined to be, "an act of plundering; a robbery; waste; consumption; a taking away, by any act of violence, the property of another." The testimony adduced, I apprehend, clearly and incontestably proves that the property of the claimant, of which he was legally and peaceably in possession in the year 1830, was *illegally* taken from him, and exhibits an "act of plundering" which constitutes a strong case of *spoliation* contemplated by the 9th, 10th and 16th articles of the treaty. If the Board, upon a careful examination of the testimony already adduced, and the law bearing upon the case, which I shall now cite, entertain this opinion, we can claim an award for the full amount of which we have been despoiled; as it is clearly a claim brought within your exclusive jurisdiction by the 17th article of the treaty, which makes it your duty to "examine and adjudicate *all* claims arising under or provided for" in the several articles of that instrument.

The first points, then, to be established, are *the occupancy of the land, upon which this gold mine was located, by the Cherokee tribe of Indians in the year* 1830, *and during the period for which Mr. Rogers claims for being dispossessed; the nature of the title under which they held their lands; that the minerals in the bowels of the earth were a portion of the same property and held by the same tenure, and that no State of this Union could legally divest them of these lands; and that their title to them could not be extinguished except by the treaty or convention entered into according to law.*

In the first place, I will call the attention of the Board to the able opinion of Judge *Clayton* of Georgia, delivered in the case of that State against *Ca-na-too*, a Cherokee Indian, "committed to jail upon a charge of digging gold in that part of the Cherokee nation not yet ceded," and who was brought before the court by writ of *habeas corpus* in the year 1832, and discharged. This opinion is now submitted for the consideration of the Board; and upon the law and argument therein set forth, I might with safety rest for the establishment of the points which I have made, and show that the *title of occupancy* is the oldest, and throws as much security around the *original occupant* as any known to Christendom. I will, however, in my own humble manner, bring before you the treaties and the law upon which we base our claim; and then ask the judgment of this Board on the important question at issue.

I will, in the outset, assert one universal principle, which recognises but two ways of acquiring the title from Indians—that is, by "*force* or *purchase*." The first has never been resorted to by the British or American Governments, since the first discovery of this country. Although it may have been indirectly threatened by the authorities of a State, the overt act was not committed; and the alternative mode—that of *purchase*, adopted first by the King of England—has never been departed from. The first treaty concluded between the United States and the Cherokee Indians was in the year 1785—two years after we had secured our independence as a separate nation. That treaty recognises the Cherokee title to their lands, in the same manner that it was recognised by the British Government; and the intercourse law, enacted by Congress in the year 1802, prescribes the mode by which they may be purchased. This law is incorporated in the intercourse act of 1834, now extant, (*see section* 12) and enacts as follows: "That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by *treaty*, or *convention, entered into pursuant to the Constitution*." [See 2d clause, 2d article of the Constitution.] Another clause of the same section of the law makes it a penal offence for any person, not employed under the authority of the United States, to attempt to negotiate such treaties; and, apparently for the purpose of prohibiting the assumption of improper power by any *State*, the same section is made to contain the following proviso: "That it shall be lawful for the agent or agents of any State, who may be present at any treaty held with Indians, under *the authority of the United States, in the presence and with the approbation of the commissioners of the United States appointed to hold the same, to propose to and adjust with the Indians* the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty."

The 11th section of the same act, which is also adopted from the law of 1802, provides as follows: "That, if any person shall make a settlement on any lands belonging, secured, or granted by treaty with the United States, to any Indian tribe, or shall

survey, or attempt to survey, such lands, or designate any of the boundaries, by marking trees, or otherwise, such offender shall forfeit and pay the sum of one thousand dollars."

I will likewise call the attention of the board to the 16th section of the same law, which enacts: "That where, in the commission by a white person of any crime, offence, or *misdemeanor*, within the Indian country, the *property of any friendly Indian* is *taken*, *injured*, or *destroyed*, the person convicted of said offence shall be sentenced to pay to such friendly Indian, to whom the property may belong, or whose person may be injured, a sum equal to *twice the just value* of the property so taken, injured, or destroyed; and, if such offender shall be unable to pay a sum at least equal to the just value or amount, whatever such payment shall fall short of the same shall be paid out of the treasury of the United States."

The 22d section of the same act provides: "That, in all trials about the right of property, in which an *Indian* may be a party on one side, and a *white person* on the other, the *burden of proof* shall rest upon the white person, whenever the Indian shall make out a *presumption* of title in himself, from the fact of *previous ownership*."

The 23d section of the same act, having reference to the provisions I have cited, makes it lawful for the President of the United States to employ military force to remove all persons found in the Indian country, in violation of this act; and the Constitution enjoins it upon him, as a duty, to cause all laws to be faithfully executed.

I have quoted thus copiously from the intercourse law, for the purpose of presenting, in one view, the manifest determination of the law-makers at that time to protect the Indians in their rights, so far as legislative enactment could protect them. It was an ordinance adopted early in our national existence, when our relations with the Indians, found in the occupancy of a large portion of the country, were new and fresh, and the intentions of our Government and people towards them were pure and disinterested. The Indian title was then held sacred; and the *mode* was prescribed by which alone it could be extinguished. The Constitution of the United States gives the President and Senate the power of *negotiating treaties with Indian tribes*, as with other nations; and, in pursuance of that clause, Congress passed the act of 1802, providing for the "purchase of their lands," and, at the same time, assumed a guardianship over their affairs generally, not authorized by the Constitution; but, with respect to the Cherokees, by virtue of a right conceded by the 9th article of the treaty of Hopewell, concluded in the year 1785, which is in the following words: "For the *benefit* and *comfort* of the Indians, and for the prevention of *injuries* or *oppressions* on the part of the citizens or Indians, the Congress of the United States shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper."

Here the relationship of *guardian* and *ward* originated between the United States and the Cherokee nation. It is a concession made by the weak and helpless to the strong and powerful; by the untutored trembling child of the forest, to the young Hercules who had just grappled with and overthrown the colossal power of England, and now stood erect in all his pride and glory, fresh from the conflict. Seventeen years after the ratification of the treaty here referred to, the intercourse law of 1802 was enacted; and the portion I have quoted has remained on your statute books, as the supreme law of the land, ever since.

I will reserve, for the present, the comments which I have to make upon the faithful execution of this law by the United States! whether it has been made to conduce to the "benefit and comfort" of the Indians, and protect them from "*injuries* and *oppressions*," solemnly promised by the treaty of Hopewell; and will proceed to show, by existing treaty stipulations, by universal custom, and by principles governing the law of nations, (always held sacred,) that the Cherokees were the *lawful owners of the land* of which they were in the occupancy at the time the present claimant was ejected from the possession of his property on Pigeon Roost Branch, for which he now claims indemnity. If I succeed in establishing this ownership satisfactorily to the Board, I can apprehend no difficulty in obtaining an award for the full amount of the property taken from his possession in violation of law.

The volume of Indian treaties, published by the War Department, contains fourteen treaties concluded between the United States and the Cherokee nation, east of the Mississippi river, *prior* to the year 1835; all of which acknowledge the validity of the title held by the Indians to the lands then in their occupancy. The first treaty negotiated with the Cherokees, as I have already stated, was concluded at Hopewell, on the Keowee, in the year 1785—two years after peace was concluded between this county and England. (See Treaty Book, page 8.) The first, second, and third articles go to establish permanent peace and friendship between the contracting parties; the fourth article fixes the boundary of the Cherokee lands; and the fifth article provides for the prevention of any settlement being made by white people upon these lands, and for the removal of those who may have already made settlements. Article seven provides that, "if any citizen of the United States, or person under their protection, shall commit a *robbery*, or other capital crime, on any Indian, such offender or offenders shall be punished in the same manner as if the robbery, or other capital crime, had been committed on a citizen of the United States."

Upon a conviction for the crime of robbery, under this article, what would be the punishment in our courts? Why, the offender would be sentenced to restore the property taken, or *pay the value thereof*, as set forth in the indictment. And a case in point is presented in the claim now under consideration before this board.

The second treaty was concluded on the bank of the Holston, in July, 1791. (See Treaty Book, page 34.) The second article of this treaty procures the pledge of the Cherokees that they "will not hold any treaty with any foreign power, *individual State*, or with individuals of any State." The fourth article recognises, and permanently establishes, the boundary lines between the United States and Cherokee nation; and provides for certain payments being made to the Cherokees, in full, for lands *already ceded*. Article seven is in this emphatic language: "*The United States solemnly guaranty to the Cherokee nation all their lands not hereby ceded.*" The remaining portion of this treaty is filled with the most solemn assurances of protection to the tribe against all intruders; and with promises of indemnity, should depredations be committed upon their lands or other property.

The next treaty was concluded in Philadelphia,

in the year 1794. (See page 39.) This treaty was intended to correct some misunderstanding which had arisen, on account of the treaty of Holston not being carried into execution, and for the purpose of more fully compensating the Cherokees for the lands they had relinquished to the United States by the two former treaties. The fourth treaty, which was concluded at Tellico, in the year 1798, provides for the removal of difficulties which occurred by delay, on the part of the United States, in having the Cherokee boundary properly defined and marked. The fourth article of this treaty *cedes another portion of their lands* for a valuable consideration; and the fifth article provides for the appointment of two commissioners—one by the United States, and the other by the Cherokee nation—for the purpose of running and marking the boundary lines. (See page 78 for this treaty.) The fifth treaty was also negotiated at Tellico, in the year 1804, (page 108,) by which the Cherokees cede another small parcel of their lands. The sixth and seventh treaties were concluded at the same place, in October, 1805. (See pages 121 and 124.) These treaties recognise and continue in force all former treaties, and also cede another portion of the Cherokee lands. In the year 1806, the next treaty was concluded at the city of Washington, (page 132.) It contains another cession of lands to the United States, and relates to the establishment of boundary lines between the Cherokee and Chickasaw nations. The next treaty arrangement was negotiated in the year 1807, and is called an "elucidation of the convention of Washington," above referred to. (See page 135.)

To the next, or tenth treaty negotiated with the Cherokees, I will especially solicit the attention of the Board. (See page 185.) This treaty is based upon an application from the executive of the State of South Carolina to the President of the United States, to extinguish the claim of the Cherokee nation to that part of their lands which lay within the boundaries of that State. The Cherokees, manifesting a desire to comply with the wishes of their brothers of Carolina, made the cession to the State; but it was done in the usual way—*by treaty entered into between commissioners on behalf of the United States and the Cherokee nation.* If the Cherokee nation had refused to make the cession, will any one pretend to say that South Carolina would have attempted to eject them from the lands by FORCE? The United States Government not only extinguished the Indian title by purchase, (the only way it could be done without violating the law and existing treaty stipulations,) but became security for the payment of the purchase-money by the State of South Carolina, under the provisions of the 2d article of this treaty. Another convention was held by the same parties, on the same day with the foregoing, for the purpose of settling some conflicting interests between the Cherokee and Creek boundaries; appointing commissioners for the purpose of running said boundary lines; and entering into an agreement by which the United States promised to indemnify certain individual Cherokees for losses which they had sustained by the march of United States troops through their nation. (See page 186.) Another treaty was concluded in September, 1816, by which an additional cession of land was made by the Cherokees, and in which it is agreed that the boundary line shall be again ascertained and marked by commissioners. (Page 199.)

In the year 1817, the important treaty was negotiated between the United States and Cherokee nation, by which the UPPER and LOWER towns of that nation agreed to separate and become two distinct communities—one to occupy the remaining country east of the Mississippi river, and the other exchanging their portion of the lands east, for a country west of that river. (Page 209.) This treaty again provides for the running of the boundary lines of the ceded lands, and recognises the title of those conceded as vesting in the Cherokee nation east.

The fourteenth and last treaty to which the eastern Cherokees were a party, prior to the celebrated treaty of New Echota, was negotiated at the city of Washington, in the year 1819, by the Hon. John C. Calhoun, Secretary of War, officially authorized to act by the President of the United States. (See page 265.) This treaty, or convention, stipulates for a final adjustment of all unsettled business under former treaties. It ratifies the cession and other provisions made by the treaty of 1817; expresses the determination of the greater portion of the nation to retain possession of the country they then occupied; and, by the 5th article, provides for permanently marking the boundary lines, with the solemn declaration made by the United States "that the leases which have been made under the treaty of the 8th July, 1817, of land lying within the portion of country reserved to the Cherokees, shall be void; and that all white people who have intruded, or may hereafter intrude, on the lands reserved for the Cherokees, *shall be removed by the United States, and proceeded against according to the provisions of the act passed 30th March*, 1802, entitled 'An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers.'"

I have now, with much care, presented a faithful history of the negotiations entered into between this Government and the Cherokee Indians east, from the year 1785, through a period of half a century, up to the year 1835. They embrace all the treaty stipulations existing in the year 1830, when an injunction was issued by the State of Georgia, by which certain Cherokees were driven from their lands and possessions; and not one word or sentence can be found to legalize or justify the act. The solemn guaranty given by the United States to the Cherokee nation, by the 7th article of the treaty of July, 1791, was still in full force and virtue; and the 5th article of the treaty then the last negotiated—that of 1819—pledged the faith of the United States to sustain and defend this guaranty, by an appeal to the intercourse law of 1802.

Here, then, we have the full recognition, by the Government of the United States, in the year 1830, of the *absolute title of the Cherokees to the lands then in their occupancy*, of which they could not be dispossessed except by *purchase*, made in pursuance of law, unless *force* was resorted to. The latter mode could not be adopted by one of the States without *nullifying* a law of the United States, and all the existing treaties (which are supreme laws) concluded with the Cherokee nation; and, in that case, the Government of the United States would have been bound to indemnify the Indians for the full value of the lands from which they were forcibly ejected.

The British Government set us the example in adopting a humane and conciliatory policy towards the Indians; and although, as the discovering nation, it might have been done by her with much more impunity, in regard to the world's opinion,

than it could since have been effected, Great Britain never attempted to take an acre of their land by *force;* but, on the contrary, uniformly resorted to the alternative mode—that of *purchase.* In the language of Judge Clayton, "she took possession of this country, subject to the right of *conquest*"—a right which every one knows confers upon the conqueror only the *empire* and the *unappropriated domain;* but private property is held sacred. The learned judge, in this division of his opinion, refers to the condition of the country in 1740, when the first agreement was entered into between *Mr. Oglethorpe,* for the British Crown, and the Indians of *Georgia.* A statement of that province, sent home to the trade office in London, in that year, shows that "not an Englishman was settled within that district when the first colony of Georgia arrived. The country was then *all covered with woods.* Mr. Oglethorpe agreed with the Indians, and PURCHASED of them the limits mentioned in the treaty." Except the charters, which granted all Georgia to Oglethorpe and his company, this is "the first instrument or compact between the *whites* and the *Georgia Indians.* And what does it imply? "Does it not," says Judge Clayton, "incontestably show some kind of *title* in the Indians? If Savannah and the surrounding country were *bought,* is it not proof that the seller had *title?* And if he had title to that which was sold, did he not retain a title to that which he did not sell? If, before Oglethorpe landed, while Georgia 'was then all covered with woods,' and in the exclusive possession of the Indians, they had MINES which they used, or might have used, that did not fall within the cession made to Oglethorpe, does any one believe that HE could, by virtue of this treaty, (there being no other instrument in the way,) have restrained the Indians from the use of those *mines?* I think no one can answer in the affirmative. Then, from that day to this, where is the treaty that is upon any other footing? If the Indians had the right then, when have they lost it? Oglethorpe, with his ceded territory, and with his company under the King's charter, was as much government of Georgia as that now is under the present constitution; and if he could not divest the Indians of their right to dig gold on their lands not ceded to him, how can Georgia do it now, with no higher right—indeed, with precisely a similar right? We have only to carry Georgia's present government back to that time, and leave out all the treaties we have had with the Indians since, and we have precisely the question above stated. Deriving our right from Great Britain, we do not pretend to claim any better title than she had; unless, indeed, it is the genius of republics to be more grasping than monarchies—a principle, I trust, that never will be admitted. The above reasoning, then, shows a time when the Indians had a right to the gold found on their land. If they have lost that right, it is certainly incumbent on the party who says he has acquired it, to show the deed by which it has passed. I confess I have looked for it in vain."

I flatter myself that I have furnished complete and satisfactory proof, before this honorable Board, in the only existing law and treaty provisions which refer to the subject, that no such "deed" exists, and that the "*title*" remained unimpaired in the Cherokees, up to the ratification of the New Echota treaty. And whilst I am in this part of my argument, I will again call your attention to that clause of the 22d section of the law of 1802, which declares that, when a *presumption* of title is in the *Indian,* from the fact of *previous ownership,* the *burden of proof shall rest upon the white person,* in all trials about the right of property, where Indians and white people are the parties.

Having now shown, by the proceedings of Mr. Oglethrope in 1740, which I have cited, how the first foothold was obtained on lands belonging to the Georgia Indians, I will call the attention of the Board to the King's proclamation of 1763, in order to show how the title of the North American Indians was respected by Great Britain. It reads as follows:

"Whereas it is just and reasonable, and essential to our interest, that the several nations or tribes of Indians with whom we are connected, and who live under our protection, should not be molested or disturbed in the possession of such parts of our dominions and territories as, *not having been ceded or purchased by us,* are reserved to them as their hunting grounds, we do therefore declare it to be our royal will and pleasure that no governor of any of our colonies do presume for the present, and until our further pleasure be known, to *grant warrant of survey, or pass patents* for any lands beyond the heads or sources of any of the rivers which fall into the Atlantic ocean, or upon any lands whatever, which, not having been ceded to or purchased by us, as aforesaid, are reserved to the said Indians, or any of them."

The next clause of this proclamation asserts the same principles and policy in reference to the rights of the Indians, and expresses a determination to protect them in these rights, which were afterwards adopted by this Government, and incorporated in the act of 1802. In conclusion, it ordains as follows:

"To the end that the Indians may be convinced of our justice and determined resolution to remove all reasonable cause of discontent, we do, with the advice of our privy council, strictly enjoin and require that no private person do presume to make any purchase from the said Indians; but that if, at any time, any of the said Indians should be inclined to dispose of the said lands, the same shall be purchased only *for us,* in our name, at some *public meeting* or assembly of the said Indians, to be held for that purpose by the Governor of our colony within which they shall lie."

I have taken up much of the time of this honorable Board in referring to the treaties and laws of the United States, and the acts of Great Britain, in relation to the mode of acquiring the title to lands occupied by the Indians of North America; and from these published documents I have established, beyond all doubt, that they held the title of *original occupancy,* which neither Government, in a single instance, attempted to wrest from them or to deprive them of, except by *purchase* made according to law. Then what is the nature of this title? and what portion of the *land* do they hold under it? This is a grave and important question, which has never been definitively settled or properly understood in this country; and I will introduce the authorities bearing upon this point, by a quotation from the opinion of Judge Clayton; because he formerly held a different opinion, and has taken much pains, in correcting his error, to present potent reasons for doing so.

"An idea prevails," says the Judge, "that the *mines* and *minerals* of a country are separate and distinct from the interest of the *land;* and that the former always belong to the sovereign. Now, noth-

ng is more erroneous; and this mistake has occa-ioned all the difficulty. I candidly own that I la-ored under it myself, and granted an injunction vith a view to settle the question; but when I came o examine the subject, I found nothing to support uch an idea. On the contrary, I found everything which was calculated to satisfy me I was wrong. Not desiring my own views, by any means, to be considered as authority, I shall speak, whenever I can, in the language of the law, as given to us by he best and most approved writers. Justice Kent, herefore, says:

" 'It is a fundamental principle in the English aw, derived from the maxims of the feudal tenures, that the King was the original proprietor of all the lands in the kingdom, and the true and only source of title.—(2 Black. Com., 51, 53, 86, 105.) In his country we have adopted the same principle, and applied it to our Republican Government; and t is a settled and fundamental doctrine with us, hat all valid individual title to land within the United States is derived from the grant of our own local governments, or from that of the United States, or from the Crown, or royal chartered governments, established here prior to the Revolution.'—3 Kent's Com., 370, and the authorities there cited.)"

The title to the land, then, being in the Indian, he question is, What is land? "In its legal signification," say Coke and Blackstone, "land hath in indefinite extent upwards, as well as downwards. Upwards to the sky,' is the maxim of the law; and, herefore, no man may erect any building, or the like, to overhang another's land; and, downwards, whatever is in a direct line between the surface of any land and the centre of the earth, *belongs to the owner of the surface*, as is every day experienced in he mining countries; so that the word 'land' includes not only the face of the earth, but everything under it or over it; and therefore, if a man grants all his lands, he grants, thereby, all his mines of metals, and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. (2 Black. Com., 18.)

The Legislature and Executive of Georgia seemed to have lost sight of all law and usage in relation to Indian rights, when they enacted laws under which they surveyed and took possession of he Cherokee lands, and removed the occupants by writs of injunction and attachment. They looked upon the Indian title of OCCUPANCY as making the Cherokees mere lessees of the State of Georgia, who had the power of restraining them from injuring, or committing waste upon the freehold of the State. On this assumption of power, Judge Clayton says:

"If this be true, she can also prevent them from cutting timber beyond what is necessary for their absolute use, and from doing many things which, n legal language, is called *waste*. Working mines comes within that definition, and is of no higher injury to the freehold than any other species of waste. But the truth is, the Indian title of occupancy assimilates itself to no principle of the English law, which gives the right to stay waste, as it s called. It is analogous to no estate, upon condition, which involves the relation of landlord and tenant, remainderman or reversioner; and these are the only three characters who can restrain waste. It must be a particular estate, to which here is a definite limit, certain as to the time of expiration, which will entitle the holder of the freehold to sustain the commission of waste. We all know what the *renting* of land means: it does not fall under this head. It is not every reversionary interest in lands that will give the right to restrain the tenant from committing waste. It is a well known fact that the state, as the source of all title, has a reversionary interest in every foot of land she grants out to her citizens; for, if they die without heirs and intestate, their lands revert to the state by virtue of the *escheat* law. Now, under this remote expectant interest, no one will contend the Legislature could restrain the good people of the state from digging gold on their lands. The state does not hold in remainder; for remainder is 'defined to be an estate *limited*, to take effect and be enjoyed after another state is *determined*. There must be a *particular estate* created, certain and determinate, as for years, for life, or in tail; and *remainder*, being a relative term, implies that a part has been previously disposed of, for, where the *whole* is conveyed at once, there cannot possibly exist a remainder; but the interest granted, whatever it may be, will be an estate in possession.' (2 Blackstone's Commentaries, 165.) Every one must perceive that this relation does not exist between Georgia and the Indians. 'An *estate* in *reversion* is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him.' (2 Black., 175.) Sir Edward Coke describes a reversion to be the returning of land to the *grantor* or his heirs, after the grant is over. Now, it is equally clear that this estate does not apply to the case of the Indians; for, instead of Georgia being the grantor, and limiting a particular estate to the Indians, which is to have a specific duration, the very reverse is true. The Indians are the *original grantors*, and reserve to themselves in the grant (to wit: the treaties) an interest which is unlimited as to time, and not to end without their consent. These are all the estates which can, by any possibility, be made to bear upon the question; and it may, with great confidence, be asserted that none other can be found. Their occupant title is unlimited as to duration; and, to them, is to all intents and purposes the same as a fee simple. They do not care what it is called, if you do not take it away by force, and will suffer them to retain the use and possession of it till they choose to part with it upon their free and voluntary consent. But we frequently attach wrong ideas to particular terms; and if it is understood, by the term *occupancy*, that it is such a title as will justify Georgia in removing the Indians whenever she pleases, nothing can be more erroneous; for, according to the legal signification of *occupancy*, as understood in the English law, they will have a right to retain their land until they voluntarily abandon or sell it. Blackstone, in describing the title *to land* by occupancy, says: 'It is taking the possession of those things which before belonged to nobody.' This, as we have seen, is the true ground and foundation of all property, or of holding those things in *severalty;* which, by the law of nature, unqualified by that of society, were *common* to all mankind. But when once it was agreed that everything capable of ownership should have an owner, 'natural reason suggested that he who could first declare his intention of appropriating anything to his own use, and, in consequence of such intention, actually took possession, should thereby gain the absolute property of it.' (2 Black., 158.) There is now no title by occupancy in England, and never was but one in-

stance, and that is now virtually destroyed by statute. The case of the Indians in America comes the nearest to it of any we know of—hence it is so called; and, applying it to the definition above laid down, it is a much more stubborn title than is usually conceived. We have seen, also, that the first discoverer (Great Britain) so chose to consider it, and imposed no other condition or restriction upon it than the right of *pre-emption* on her part. This has been followed up by Georgia, by the other States, and by the United States; so that, as far as human action and decision can confirm and settle a question, this is at rest."

Having now, I humbly conceive, clearly established before this Board, by the only treaty stipulations and law of the United States existing upon the subject, and by authorities which cannot be controverted, that the Cherokees held the title of occupancy to certain lands in Georgia in the year 1830, and until it was extinguished by the treaty of 1835; that this title was as good, and held as sacred in the hands of the Indians, as a *fee simple* held under patents from the United States; and that the gold mines discovered within the boundary of these lands were not a separate and distinct property, but incorporated with the lands; I will proceed to establish the following points by testimony which, I apprehend, will be satisfactory to the Board:

First. That the *deposite gold mine* on Pigeon Roost was claimed and occupied by Rogers (a Cherokee) in the year 1830.

Second. That it was located within the boundaries of the Cherokee country, upon lands ceded by that nation to the United States by the treaty of 1835-'36.

Third. That Mr. Rogers was forcibly dispossessed of this property by the authorities of the State of Georgia in the year 1830, and kept out of possession by the same power until the year 1838, when the Cherokees surrendered possession of their entire country, under the provisions of the 16th article of the New Echota treaty.

It is in proof before the Board, that Governor Gilmor, of Georgia, under authority of a law of that State extending its jurisdiction over the Cherokee country, issued a proclamation, requiring all Cherokees, engaged in digging gold on their own lands, to desist from so doing. This proclamation being disregarded by the Cherokees, who claimed to be the rightful owners of the lands, a bill of injunction was issued, a copy of which is also before you. By reference to this bill, you will find the name of the present claimant as one of the persons enjoined; and, upon his refusal to obey it, he was arrested on a writ of attachment, and dragged before one of the courts of Georgia, sixty miles from the place of his operations. He was there fined, and threatened with imprisonment, and only escaped the sentence by binding himself to obey the injunction, and cease operating in his mines. The proof of these allegations is before you in the testimony of *James Law*, clerk of the superior court of Hall county, by which the bill of injunction was granted; and in the testimony of *A. Chastain*, deputy sheriff of said county, who certifies that he "served a bill of injunction at the instance of Governor Gilmor, in the year 1830, upon Johnson K. Rogers and others, who were at that time engaged in mining on Pigeon Roost Branch, in what was then called Hall (now Lumpkin) county, Georgia: that afterwards, in the same year, he arrested said Rogers and two others, by virtue of a writ of attachment placed in his hands by the Governor of the State, and conveyed them under a strong guard to Watkinsville, Clark county, in the same State where the superior court was then in session. They were there arraigned before Judge Clayton, (who has since reversed the opinion then entertained;) and they were committed to jail until they paid the costs of arrest, which they did do. They were also compelled to give security for their appearance at the next term of the superior court of Hall county; but the court afterwards dismissed the case, upon the promise of the prisoners to obey the injunction." *This testimony is on file—see paper marked B.*

I have now proceeded so far as to show that my client, Johnson K. Rogers, was in possession of a gold mine in the year 1830, on lands then belonging to the Cherokee nation; that he was a Cherokee, entitled by the laws and usages of the nation to occupy and work said mines; that he was forcibly dispossessed of this property by the authorities of Georgia in 1830, and that he has since that time been kept out of possession. The testimony adduced to establish this position requires no explanation from me to give it character before this tribunal. A "spoliation" has, then, been committed by the authorities of a sovereign State upon the property of the claimant, a Cherokee Indian; and how is the amount of the damages he has sustained to be ascertained? and from whom, and in what manner, must he obtain indemnity? With regard to the former, I presume this Board will agree to be governed by a standing rule of law, and require nothing more than "the best evidence of which the nature of the case admits." The claimant in this case has complied with this rule, as far as it was in his power to do so. He has brought before you four respectable citizens of Georgia, who swear that they have a perfect knowledge of the mines on Pigeon Branch, on which Mr. Rogers was operating in the year 1830. Their testimony is before you, in papers numbered 1, 2, 3, and 4. The first witness, *Milton H. Gothright*, testifies that he "was mining for gold on Pigeon Roost Branch in the year 1830; that said branch contains very valuable and rich gold deposite mines; that the portion he worked yielded him upwards of 2 dwts. to the hand per day; that the other operatives made equally as much to the hand, and some of them more; that in June, 1830, after *intruders* from other States were removed by the United States troops, he saw J. K. Rodgers engaged in mining on this branch;" and he further swears that he "is confident, *from his own knowledge*, that these mines have been worked over four or five times since 1833, when he became a permanent resident of Lumpkin county, and that they have invariably yielded from 1 to 2 dwts. to the hand per day." (*See testimony No.* 1.)

The second witness, *James Lamar*, swears that he was "well acquainted with Mr. Rogers, the claimant, in the year 1830, who was then engaged in digging for gold on Pigeon Branch; that he (deponent) was engaged in digging on same branch, and his mine yielded him 3 dwts. to the hand each day; and had intruders been kept off by the United States, more than that amount could have been constantly made." This witness describes the richness of the whole branch; and "is certain, from the position occupied by Rogers, that, had he kept possession, the average to the hand would have greater than deponent's."—(*See testimony No.* 2.)

The testimony of *Lewis Ralston* corroborates the statements of the preceding witnesses. He swears that he knows of his own knowledge, that, with or-

dinary industry and skill, the mine would and did yield at *least* 2 dwts. per day to the hand, upon an average of all the expenses and labor in preparing the same for work, including the loss of time by wet weather.—(*See testimony No.* 3.)

H. C. Tatum testifies that he worked a mine on Pigeon Roost Branch, during the latter part of the year 1829 and spring of 1830; that it was remarkably rich, yielding him from one to three pennyweights per day during the whole time; that J. K. Rogers was engaged in mining at the same place, during the same period of time, and until he was forcibly removed by the authorities of Georgia.—(*See testimony, No.* 4.)

Here are four respectable citizens of the United States, swearing positively to the value of the mines wrested from Mr. Rogers; and, taking their estimates, we have clearly established the full amount of our claim. The credibility of these witnesses stands before this Board unimpeached and unimpeachable. They have been within the reach of cross-examination, if desired by any party interested; but it has not been resorted to; and, although this case has been publicly before the Board for a considerable length of time, no rebutting testimony has been offered. We can, therefore, claim the full benefit of all the testimony relevant to the case which we have adduced, under a rule of evidence everywhere respected. Who are the parties in this case? Why, the United States, either on its own behalf, or as guardian for a sovereign State, and a Cherokee Indian, who charges that his property has been forcibly taken from him. Now, let us go back to the law of 1802, section 22, and there we find the covenant: "That, in all trials about the right of property, in which an *Indian* may be a party on one side, and a *white person* on the other, the burden of proof shall rest on the white person, whenever the Indian shall make out a *presumption* of title in himself, from the fact of previous ownership." The claimant in this case has not only made out a *presumption* of title to the property on Pigeon Roost, but has furnished incontrovertible proof to establish an absolute title, held in pursuance of law and treaty stipulations; and that he was ejected from his possession by white citizens of Georgia, acting under authority of the government of that State. Will it be pretended that the various treaty stipulations, and the provisions of the intercourse law I have cited, guaranteeing protection and indemnity to the Indians, did not intend to protect these people against depredations committed by *white* citizens of a State when acting under the authority of the executive of that State? I apprehend that no one will say that the law or treaty-making power could be guilty of practising such an imposition upon the Indians. The United States constituted themselves guardians of the Indians by the law of 1802; and it was as much the constitutional duty of the Executive to cause that law to be faithfully executed when its provisions were infringed upon by the *constituted authorites* of a State, as when the act was perpetrated by *individuals* of the State. A mode is prescribed by this law, and by the various treaty stipulations I have quoted, by which the Indians shall be remunerated for losses sustained by depredations committed by *white persons*. The 15th section of the intercourse law enacts that, "*where the property of any friendly Indian is taken* or destroyed in the Indian country, the person convicted of the offence shall be sentenced to pay to the Indian to whom the property shall belong, a sum equal to *twice* the amount of the property taken or destroyed; and if the offender is unable to pay, the United States promise payment out of the treasury. And it goes still further: the last clause of the section provides, "that if such offender cannot be apprehened and brought to trial, the amount of such property shall be paid out of the treasury, as aforesaid." This is a high-sounding guaranty; but who is to arrest and prosecute the offender to conviction, if he can be found? Most assuredly not the injured Indian; for he had nothing to do with the enactment of the law; had no competent court to try the offence; and, in the courts of Georgia, could not be a *party to a suit brought against a white person*. It must be done by the Government of the United States, which has assumed the guardianship over the rights and property of the Indians, by the law providing punishment for the offence. The United States having refused or neglected to comply with the provisions of this law, and the stipulations of the several treaties already existing, so far as the Cherokees were concerned, provision was made by the treaty of 1835 "to pay and liquidate the just claims of the Cherokees upon the United States for *spoliations* of every kind, that have not been already satisfied under former treaties." The 9th and 16th articles of this treaty also recognize and continue the original guaranty of the United States protecting the Cherokees in possession of their lands, and providing indemnity where "spoliations" have been committed. The 16th article, in stipulating for the protection of the Cherokees in "their possessions and property" for and during the term of two years after the ratification of the treaty, makes the solemn promise to those who may have been unlawfully dispossessed, that they shall again be put in possession, "and placed in the same condition in reference to the laws of the State of Georgia, as the Indians that have not been dispossessed; and if this is not done, and the people are left unprotected, then the United States shall pay the several Cherokees for the losses and damages sustained by them in consequence thereof."

The spoliation claims, for which payment is provided in the several articles I have read, were created under the provisions of the law of Congress and then existing treaties which defined the character of such claims, and pledged the faith of the United States for their liquidation. But the treaty of 1835 has designated a special tribunal by which all the claims arising under, and provided for, by that treaty, shall be examined and adjudicated. This tribunal is the present Board, organized under the 17th article, which confers upon it powers of a high, delicate, and imposing character; within its legitimate sphere of action, they are equal to those possessed by the Supreme Court of the United States. It has the sole and exclusive jurisdiction over every claim arising under the treaty by which it has been created, and its decisions are made "final." No appeal can be made to any other tribunal known to the laws of the country; and no department of this Government has a right to prescribe the boundaries of its jurisdiction, or review or alter its decrees when rendered. You are the commissioners composing the Board clothed with these stupendous powers. They are conferred by the joint action of the United States and the Cherokee nation. Your Board is the *offspring of the two nations*, made so by the words of the compact. You are, therefore, commissioners appointed on behalf of the Cherokees, as well as on behalf

of the United States; and the Indian claimants look to you as the ark of their safety, in the contest in which they are now engaged to obtain their just rights.

The treaty of 1785, negotiated *fifty-seven years ago*, obtains the concession from the Cherokees to the United States of the right to manage their affairs, under the specious declaration that it is done "for the *benefit* and *comfort* of the Indians, and for the prevention of *injuries* and *oppressions*." This protestation may have for some years been held sacred, but it gradually subsided; and, in consequence of a series of "*oppressions* and *injuries*," in the year 1835 the last Indian was stripped of his birthright. The millions of acres of the choicest lands now embraced within the limits of four States of this Union, passed from the Cherokee nation into the hands of their oppressors, and they had not one acre left in the home of their fathers. This is not a flight of the imagination; but sober, serious, naked truth. They ceded their country because they could no longer inhabit it in peace; and a large portion of them were compelled to comply with the nation's part of the contract, at the point of the bayonet. How has that cantract been executed on the part of the United States? Why, upwards of seven years have been suffered to elapse since its ratification, and it is still not complied with, although the Indians have been unceasing in their appeals to the Government for the payment of claims therein provided for. On behalf of the claimants whom I have the honor to represent before you, I ask a patient and attentive hearing. I appeal not to your sympathies; I appeal not to your pity; I appeal not to the kind feelings which I know you possess towards the Indians; but I appeal confidently and boldly to your high sense of JUSTICE, to your exalted character for integrity, honor, ability, and independence, which will always induce you, in the discharge of the sacred and responsible duties confided to your care, to do that which you believe to be right and just, regardless of consequences. The fate of a people is in your hands, who believe they have been grievously injured by the Government of the United States. They may again be rendered independent and happy, or beggared by your decrees; and their case claims your serious and deliberate consideration.

In the case of Johnson K. Rogers, I humbly venture the assertion, that a claim for a "*spoliation*" is made out, which comes clearly within the pale of your jurisdiction. It exhibits a depredation or trespass of the most aggravated character; and if it had been committed by one citizen of a State against another, and the damages assessed by *a jury of their countrymen*, the amount awarded would more than double the intrinsic value of the property of which the plaintiff was dispossessed. Mr. Rogers makes out his account for losses sustained through a period of seven years and eleven months, extending from the time he was dispossessed of his property (in June, 1830) to the 23d of May, 1838, when the Cherokees, under the 16th article of the treaty of 1835, were compelled to relinquish the occupancy of their possessions and property in the ceded lands. He estimates his losses from the net profits accruing to him from the labor of *eight* hands employed in working his mines during the time he was in occupancy. This is the usual mode adopted by Congress in awarding indemnity, where Government contracts have been violated by the United States; and a treaty is a *contract* which the Government cannot violate without indemnifying the injured party, in like manner, if no other mode of redress was prescribed by its provisions. But, in the present case, Mr. Rogers was in possession of a valuable gold mine, which, under existing treaties and laws of the United States, and the laws and usages of the Cherokee Nation, he had a right to occupy and work; and he might as well have had *fifty* hands employed as *eight*, and thereby proportionably have increased his claim for indemnity, by virtue of these laws and treaty stipulations. If the gold embedded under the surface of the earth, which he had the right to excavate, could have been collected in one great reservoir, it might have been weighed, and its value accurately ascertained; for, not like other minerals, it has a regular, fixed value, which neither increases nor diminishes by the change of the times; and, in that case, this honorable Board could not have avoided awarding in his favor for the full amount. But, this not being practicable, he has limited his claim to the profits which would have accrued to him by the labor of eight workmen; and this has been ascertained by the best mode that could be adopted under the circumstances of the case. The law I have cited, and the testimony adduced, appear to me to be full, ample, and complete; every crevice is filled, and every joint is in its place; the credibility of the witnesses has not been questioned, and the evidence—which is "the best of which the nature of the case admits"—clearly proves that a *spoliation* has been committed, amounting, at least, to the sum of $23,338, for which we now claim an award.

I now submit this case into your hands, with the earnest invocation that, in its consideration, you will have impressed upon your minds the important and sacred character of your connexion with the Cherokee claimants; that you constitute a tribunal, from whose decrees, when rendered, there can be no appeal; that you will look upon the shattered remnant before you as a portion of that once proud and mighty people—the aboriginal owners of a country whose acquisition has contributed so much to the wealth and power of this great nation; that you will keep in mind the degrading truth, that *technicalities*, whenever they are introduced into an Indian treaty, are intended to *deceive the Indians;* and that you will frown upon every attempt made by any department or functionary of this Government to force upon you a construction of this treaty other than is warranted by the manifest INTENTION and MEANING of the Indian party to the compact, at the time it was negotiated; that you will hold sacred that great principle in international law which gives the benefit of all *doubts* arising in the interpretation of treaties to the *weaker* party; and that, in making up your judgment, you will adopt the benign maxim of our law, which says, "that it is better that ninety-nine guilty men should escape than that one innocent man should suffer;" and, applying it to your suffering Cherokee suitors, say, that it is better the *treasury should be emptied* than that the most humble among them should, on account of any technical exception or error in properly submitting the case, not obtain full, ample, and complete *justice*.

S. C. STAMBAUGH